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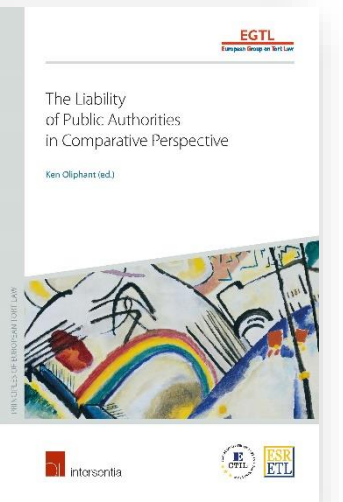
The Liability of Public Authorities in Comparative Perspective

Ken Oliphant (ed.)



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THE LIABILITY OF PUBLIC AUTHORITIES IN COMPARATIVE PERSPECTIVE

Ken Oliphant

I. INTRODUCTION

A. OVERVIEW

01 As stated at the outset of this volume, and underlined in its pages, liability relating to public authorities ('public authority liability') has in recent decades been one of the main focuses of development in and at the edges of tort law in Europe, with major reforms implemented or considered at national level, and a steady stream of major court decisions.[1] During the same period, 'Member State liability' has also been recognised in the law of the EU,[2] and the interplay of principles of national and EU law – and additionally the 'just satisfaction' jurisprudence of the European Court of Human Rights[3] – evidently warrants close attention. Though several major comparative law studies on public authority liability have already been undertaken,[4] the European Group on Tort Law Group felt that it would be able make a meaningful contribution to

1 In this chapter, the following two-letter codes are used in citing the reports in Part I of this volume: AT (Austria); BE (Belgium); CZ (Czech Republic); DK (Denmark); EW (England and Wales); FR (France); DE (Germany); GR (Greece); IS (Israel); IT (Italy); NL (the Netherlands); NO (Norway); PL (Poland); PT (Portugal); ZA (South Africa); ES (Spain); CH (Switzerland); and US (the United States of America). The same codes are used in citing the case study analyses in Part II, preceded by the number assigned to the case in question. 'Econ' denotes the Economic Analysis and 'Comp' the Comparative Remarks. The number after the letter coding indicates the paragraph(s) within each report or analysis to which reference is being made.

2 Starting with Case C-6/90, *Francovich v Italy* [1991] European Court Reports (ECR) I-5357. As to the nature of the liability, and its subsequent jurisprudential development, see EU 58 ff.

3 See generally *A Fenyves/E Karner/H Koziol/E Steiner* (eds), Tort Law in the Jurisprudence of the European Court of Human Rights (2011).

4 To mention only a few that compare a broad cross-section of national jurisdictions: *H Mosler* (ed), Haftung des Staates für rechtswidriges Verhalten seiner Organe (1967); *J Bell/AW Bradley* (eds), Governmental Liability: A Comparative Survey (1991); *B Markesinis/J-B Auby/D Coester-Waltjen/S Deakin*, Tortious Liability of Statutory Bodies (1999); *D Fairgrieve/M Andenas/J Bell* (eds), Tort Liability of Public Authorities in Comparative Perspective (2002); *H Belrhali-Bernard* (ed), La Responsabilité Administrative: Comparaison Internationale, special issue of the *Revue Française de Administration Publique*, no 147, 2013; *O Dörr*, Staatshaftung in Europa. Nationales und Unionsrecht (2014). Valuable shorter surveys include *R Rebhahn*, Public Liability in Comparison – England, France, Germany, in: H Koziol/BC Steininger (eds), European Tort Law 2005 (2006) 68–93; *E Karner*, Die Haftung des Staates für administratives, judikatives und legislatives Unrecht aus rechtsvergleichender Perpektive, in: Tagungsband XX Karlsbader Juristentag (2012) 93–113. For analysis of (inter alia) Member State and Union liability under EU law, and comparison with national laws, see *W Wurmnest*, Grundzüge eines europäischen Haftungsrechts. Eine rechtsvergleichende Untersuchung des Gemeinschaftsrechts (2003); *H Koziol/R Schulze* (eds), Tort Law of

the existing literature and decided to embark on its own investigation of public authority liability from a comparative perspective. Its aims in so doing were twofold: first, to contribute to the understanding of the law of public authority liability as it currently stands in the various European legal systems, and in selected legal systems elsewhere in the world, and thereby to facilitate its enhancement where necessary or desirable; secondly, to address the possibility for harmonisation in the area – specifically, through the extension and adaptation of its Principles of European Tort Law (PETL)[5] to cover the liability of public authorities. The rest of this chapter highlights some of the key findings of the Group's research, presented under the headings used in the questionnaire for the reports in Part I, before returning at the end to the issue of common principles of public authority liability.

B. HISTORICAL EVOLUTION

02 Public authority liability is a child of the 19th and 20th centuries.[6] Until the middle of the former century, all legal systems observed the maxim 'the King can do no wrong' (often rendered in French: *le roi ne peut mal faire*).[7] The immunity of the State for the actions of its servants was underpinned by the theory that the civil servant's mandate to act extended only to lawful and correct conduct which could never lead to liability (*Mandatsvertragstheorie*, mandate contract theory).[8] But gradually, from the mid-19th century on, the immunity was limited in application, then abolished. The idea first gained ground that the State should be liable for wrongs of its servants insofar as it acted in the private field (bought goods, rented buildings, etc).[9] An English decision of 1866 established that a public corporation could be liable for the negligence of its servants in the same way as a private employer.[10] The imposition of vicarious liability on public authorities was also accepted in case-law in other parts of Europe, often paving the way for subsequent legislation.[11] Where courts proved reluctant to admit such liability, the legislature intervened independently, for example in Israel's Civil Wrongs (Liability of the State) Law of 1952, in the 1930 revision of the

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the European Community (2008). Comparative legal analyses of specific issues in public authority liability are cited at appropriate points below.

5 See *European Group on Tort Law*, Principles of European Tort Law. Text and Commentary (2005).

6 To echo the language of DE 7.

7 DK 5; DE 7; EW 3 (Crown immunity); FR 4; IS 4; NO 3 f; PT 9; ZA 2; US 6 f. See also CZ 3; IT 120 note; PL 4.

8 DE 7. See also IT 77.

9 DE 8.

10 *Mersey Docks and Harbour Board Trustees v Gibbs* (1866) LR 1 HL 93, noted in EW 3.

11 DE 8 (applying §831 BGB); DK 5; GR 6; IT 11; NL 5; NO 4; PL 4. Cf the judicial recognition in Belgium of the liability of public authorities for their own fault under art 1382 CC: BE 8.

Portuguese Civil Code, in colonial legislation in South Africa around the turn of the century, and in a somewhat ambiguous provision of the Spanish Civil Code of 1889.[12] In some countries, provision was made for State liability as a matter of constitutional law, though the further implementing legislation required often had to wait for quite some time.[13] Other limitations remained: in Switzerland, for example, federal legislation of 1850 (Federal Act on the Responsibility of the Authorities and Civil Servants) placed primary responsibility on federal employees and agents and the Confederation's liability for administrative acts was subsidiary and limited to cases where the agent was financially unable to repair the damage.[14] This and other anomalies were only finally cleared away in the period after World War II, which saw the legislative abolition of most remaining vestiges of the erstwhile immunity.[15] Similar reforms were enacted even in the communist East of Europe,[16] but there the identity of the State with the party did not create propitious circumstances for the enforcement of the liability.[17] The restoration of democracy consequently acted as a stimulus to further legislative reform.[18]

03 The movement from immunity to liability of increasing extent,[19] as described above, coincided with a move away from the exclusive liability of the individual servant towards the joint liability of the public institution by which the servant was engaged (*respondeat superior*) and frequently its exclusive liability.[20] This is pursued further in II.D below (no 43).

04 Even up to the present, public authority liability has continued to attract the attention of the legislator in several places, with new laws adopted in the last twenty years in (for example, and to mention only jurisdictions within the present study) Belgium, the Czech Republic, the Netherlands, Poland and

12 IS 4; PT 12; ZA 2; ES 15 ff.
13 AT 5; PL 3 ff.
14 CH 5.
15 AT 6 (*Amtshaftungsgesetz*, Liability of Public Bodies Act, entering into force in 1949); EW 3 (Crown Proceedings Act 1947); IS 4 (Civil Wrongs (Liability of the State) Law 1952); CH 7 (State Liability Act 1958); US 8 (Federal Tort Claims Act 1946). In this period, see also ZA 2 (State Liability Act 1957, incorporating existing statutory rules).
16 CZ 4 f (enacted but never applied); PL 5 (Act of 1956, incorporated into the Civil Code of 1964). As regards the former German Democratic Republic, see DE 3.
17 CZ 3. See also PL 5 ff and 80.
18 CZ 6 (State Liability Act 1998); PL 9 ff (incremental reforms culminating in insertion of new provisions in the Civil Code in 2004).
19 But note the discussion of the retrenchments that have occurred in some countries in consequence of concern that public authority liability may have extended *too far*: EW 3; IS 11 ff.
20 PT 8 ff.

Portugal.[21] And as yet unimplemented proposals for legislative reform have also been introduced in England and Wales, Germany and South Africa.[22]

05 The influence of EU law and the ECHR – on both legislation and judicial development of the law – is recognised in several legal systems,[23] though denied elsewhere.[24] As regards EU law, such influence as has been felt has been focused mainly on the areas of liability for court decisions and liability for legislation. The Court of Justice's development of Member State liability opened minds to the possibility that liability might arise in respect of legislative acts[25] or omissions[26] and supreme court decisions.[27] In Belgium and Poland, the European case law has been identified as a major influence on the recognition of liability for primary legislation and decisions of courts of final instance.[28] The same is also true of the development in France of fault-based liability for legislative breach of an international treaty.[29] Elsewhere, courts have so far proved resistant to suggestions that they should recognise what would be new heads of liability in these areas,[30] though there is ongoing debate – and the potential for future developments – in several legal systems.[31] Some more specific influences of EU law may also be identified, for example in the extension of compensation under Italian law to all legitimate interests[32] and the judicial adoption in Polish law of criteria to be applied in assessing legislative wrongs which are reminiscent of those in the jurisprudence of the Court of Justice.[33] A particular matter of

21 BE 5, 43, 46 f: Act of 10 February 2003 on the Liability of and for Personnel of Public Legal Bodies; CZ 6, 8 f: Act No 82/1998 Coll on Liability for Damage Based Either on Maladministration or on Illegal Decisions (State Liability Act); NL 7: Codification of State Liability in Respect of Lawful Activities and Unlawful Decisions by Public Authorities (at the time of writing, only partly implemented); PL 16: Law on the Revision of the Civil Code of 17 June 2004 (revising arts 417–421 of the Polish Civil Code); Portugal: Law 67/2007 of 31 December 2007. See also the legislative reforms, in countries not included in the Group's research, listed in *K Oliphant*, Comparative Remarks, European Tort Law 2008, no 35.

22 EW 50 ff, referring to *Law Commission*, Administrative Redress: Public Bodies and the Citizen, Consultation Paper No 187 (2008); DE 11, referring to *Staatshaftungsgesetz* (State Liability Act), BGBl I 553, declared unconstitutional by the German Constitutional Court (*Bundesverfassungsgericht*, BverfG) in its decision of 19 October 1982, Entscheidungen des Bundesverfassungsgerichts (BverfGE) 61, 149; ZA 2, referring to the State Liability Bill of 2009 which has not yet advanced through Parliament.

23 CZ 17; DK 6; EW 4 (as regards the ECHR); FR 9, 46; NO 7; PL 12 ff; PT 57, 75.

24 EW 4 (as regards EU law); CH 10.

25 Case C-48/93, *The Queen v Secretary of State for Transport, ex parte Factortame Ltd* [1996] ECR I-1029.

26 Case C-6/90, *Francovich v Italy* [1991] ECR I-5357 (failure to implement Directive).

27 Case C-224/01, *Köbler v Austria* [2003] ECR I-10239.

28 BE 14, 33; PL 13, 16.

29 FR 46.

30 AT 6; CZ 107 (legislation); GR 50 f (judiciary).

31 CZ 47; DE 59; GR 50 f; NL 56, 76; PL 30.

32 IT 24 f.

33 PL 75.

continuing discussion is whether the Court's *Köbler* case law casts doubt on existing requirements that a judicial decision must first be reversed before the action to establish state liability can be brought.[34] But there is little evidence that the Court's general approach to Member State liability, based on the test of 'sufficiently serious' breach, has gained traction in the judicial development of national law or amongst law reformers.[35] Overall, the conclusion must be that EU law's influence on national public authority liability law has been limited in geographical range and restricted to specific issues. Nowhere can it be said that it now shapes the whole debate on public authority liability.

06 The ECHR has a wider importance within national public authority liability law insofar as it is possible to claim in domestic courts for violations of Convention rights, whether the violation serves to establish the necessary element of fault or unlawfulness, or gives rise to liability under a separate statutory mechanism (see no 46 below). The availability of relief under the Convention has highlighted the widespread problem of delays in the justice system, leading to legislative reforms in some places.[36] In France, the courts have responded to the Strasbourg jurisprudence by abandoning the requirement of serious fault in such cases.[37] Danish courts feel under pressure to recognise awards for non-pecuniary loss attributable to court delays.[38] Elsewhere, a miscellaneous set of other influences exerted by the ECHR can also be identified, including a greater degree of solicitation regarding conditions in prisons,[39] a strengthening of the law of freedom of expression[40] and the protection of homeowners against the disturbance caused by public works.[41] In Greece, the ECHR has been used in support of constitutional challenges to various aspects of State liability law, including whether the standard two-year time limit for claims against the State by its employees is contrary to art 6(1).[42] In the UK, the ECtHR jurisprudence has been relevant in determining the meaning of 'public authority' under the Human Rights Act 1998.[43]

34 PL 30; PT 49, 90, 112.
35 Cf the failed reform initiative, adapting the 'sufficiently serious' test, in the United Kingdom: EW 4, 49 ff.
36 CZ 17; IT 158 ff; PL 91. See also DK 44 ff (challenges to Danish law posed by ECtHR jurisprudence); NL 52, 56, 70 (judicially recognised liability precluding need for legislation).
37 FR 9, 47.
38 DK 6, 16, 46.
39 PL 85.
40 PT 87.
41 ES 85. See no 47 below.
42 GR 12 f, 16 ff.
43 EW 5 note. Cf CZ 23 (neither EU law nor ECHR influential in understanding of 'state').

C. DEFINING THE PUBLIC SPHERE

07 Even to assign the label 'public authority liability' is to assume a distinction between public and private spheres that has never been easy to make – and has been further problematised in modern times by the radical reconceptualisation of the nature, role and responsibilities of the State that has occurred across legal systems, with reference to such phenomena as the out-sourcing of public services, the transformation of State agencies into privately owned enterprises, and public–private partnerships.[44] This has necessitated a flexible approach to the distinction's application, relying upon a sliding scale rather than a fixed borderline[45] and upon case-by-case judgment rather than fixed definitions.[46] The wide variety of natural and legal persons and diverse set of activities in respect of which public authority liability may arise are thus marked out by a number of different tests that are employed, often cumulatively, to distinguish the public and the private. One looks at the source of the body's authority and asks whether it was established under, and so a creature of, public law.[47] In some legal systems, such bodies are listed in a constitutional or statutory document,[48] though often with an open-ended catch-all (for example, 'other public entities')[49] that simply defers the question of where the line between public and private is to be drawn. Sometimes, the nature of the office held by the actor is significant, as in Germany under §839 BGB (liability in respect of official's breach of duty),[50] though what is important here is the public function performed rather than the formal position as civil servant.[51] Functional aspects are also emphasised elsewhere, the object of inquiry being the aim to be fulfilled by the task in question.[52] Another test addresses the nature of the authority under which the conduct is pursued;[53] its focus is what may be termed 'public prerogatives'.[54] Or the spotlight may be thrown onto the nature of the conduct in question: echoing the classical distinction between *acta iure imperii* and *acta iure gestionis*, a line may be drawn, for example, between acts of a public and private character, or between acts under private and public law.[55] In

44 DE 12.
45 EW 5; NL 9.
46 DK 7; EW 5; IT 29 (definition only in specific contexts); NL 9.
47 AT 7, 26; DE 44; GR 8; IT 33 ff; PT 99.
48 AT 7; CZ 19 ff; IS 25; PT 30; ZA 3.
49 PT 22, 29 ff. See also CZ 21 ('persons carrying out functions within the public administration which they have been entrusted with by law'); PT 31 ('state' and 'public entities' left undefined).
50 DE 2.
51 DE 16.
52 AT 8; ES 29; CH 11.
53 BE 9; CZ 21; GR 7; IS 25; PL 17.
54 PL 21.
55 AT 9 (no longer reflected in the constitutional wording but considered self-evident); DK 7; EW 39; GR 1, 7; IS 23; NL 9; PL 19 ff; CH 13.

the US, the traditional governmental–proprietary distinction has mostly been superseded by one opposing the discretionary with the ministerial, which posits the discretion allowed to the person acting as the distinguishing feature of the public realm.[56]

08 Most legal systems attach significance to *all* these various factors in determining the scope of public authority liability, but some qualifications should be noted. In Portugal and Spain, for example, a unitary regime applies that makes no distinction between the public and private activities of the State.[57] France tends in the same direction, but a miscellaneous set of claims still find their correct forum in the ordinary courts, including those relating to accidents caused by vehicles belonging to the administration, or accidents at school, or concerning 'commercial' or 'industrial' public services.[58] A mixed approach is to be found in Germany, where the liability of the civil servant under §839 BGB arises irrespective of the classification of the act in question as public or private, but it is only in respect of the former that the liability is transferred to the State on the basis of constitutional principle.[59]

09 In many legal systems, the special liability regime for public authorities embraces private entities performing public functions or exercising public authority.[60] In Portugal, for example, the administrative courts have exclusive jurisdiction even in claims concerning private entities performing a public administrative function.[61] Likewise, in France, actions against contractors undertaking *travaux publics* go before the administrative rather than civil courts.[62] It is further noted as regards Germany that, where the State explicitly mandates private persons or organisations to perform public functions, it retains liability for their wrongs.[63]

10 National approaches to the scope of the public sphere have mostly developed independently of the transnational European law on the issue.[64] In one sense, the

56 US 12.
57 PT 31 (former distinction abandoned in Law of 2007); ES 36.
58 FR 11.
59 DE 2, 34.
60 FR 12; IS 24; PL 17; PT 33. Unclear: DK 11.
61 PT 33.
62 FR 12.
63 DE 15.
64 As to EU law, see Case C-188/89, *Foster v British Gas plc* [1990] ECR I-3313. As to the ECHR, see *Costello-Roberts v United Kingdom*, no 13134/87, 25 March 1993 (delegated state functions); *DJ Harris et al*, Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights (3rd edn, 2014) 81 ff. See also *International Law Commission*, Responsibility of States for Internationally Wrongful Acts (2001), arts 4 (state organs) and 5 (persons and entities exercising elements of governmental authority), reproduced in: Yearbook of the International Law Commission 2001, vol II, 26 ff.

notion of 'State' is wider under national law, since 'State liability' under EU law and the ECHR only attaches to the nation state; other public authorities are not recognised as subjects under public international law.[65] But that is to consider only one aspect of how the public realm is defined in these legal orders.[66] In Italy, for example, the national definition is said to coincide with that under European law – specifically, the definition of 'body governed by public law' under the EU Public Contracts Directive.[67]

D. COURTS AND PROCEDURES

11 One indicator of whether public authority liability is considered to be public law or private law is whether claims are assigned to the ordinary civil courts or to administrative courts or tribunals, and the procedures to be applied in those claims. In fact, in most of the countries included in the present study, public authority liability claims are brought in and heard by the ordinary civil courts.[68] In general, the ordinary rules of civil procedure are applied,[69] though there are some exceptions (see no 14 f below). In a minority of countries, public authority liability claims are handled exclusively by administrative courts or tribunals.[70] In Italy and the Netherlands, both civil and administrative courts have jurisdiction.[71]

12 The interaction between public authority liability claims and 'ordinary' public law actions – for example, for annulment of an administrative decision – can be highly complex. In some legal systems, the claimant must exhaust all other available remedies, including those available under public law, as an absolute precondition of suing the public authority for damages.[72] This effectively entails a two-stage procedure: a determination of the legality of the conduct, followed by resolution of the claim for damages.[73] Sometimes there is

65 AT 7; to like effect as regards the ECHR: NO 8.

66 See also the concept of 'governmental organisation' presupposed by art 34 ECHR.

67 IT 34 ff, with reference to Directive 2004/18/EC of the European Parliament and of the Council of 31 March 2004 on the coordination of procedures for the award of public works contracts, public supply contracts and public service contracts, art 9, supplemented by non-exhaustive lists in Annex III.

68 AT 11 (exclusive competence of regional courts, *Landesgerichte*); BE 10; CZ 26; DK 12; EW 6; DE 17; IS 26; NO 11; PL 24; ZA 5; US 15 f (but without a jury in federal claims and claims in some states).

69 BE 10; EW 6; DE 17; IS 26; NO 11; US 15 f (but no jury in federal claims and in some states).

70 FR 13; GR 5, 10; PT 33 (except in relation to judicial errors: PT 34); ES 38, 44 ff.

71 IT 40 ff (depending on the particular characteristics of the claim); NL 21.

72 AT 10; DE 19; NL 14, 20; ZA 5; US 15 (federal claims).

73 PL 25.

scope for the award of compensation in annulment proceedings,[74] but this is not possible in all legal systems.[75]

13 Where a two-stage procedure is not required, the claim can still proceed even if not all the alternatives have been explored; the action for damages is independent from the relief sought against the act or omission from which the compensation claim derives and can be filed even if the person affected chooses not to seek such relief.[76] But that failure may count as contributory fault reducing the damages awarded[77] – and sometimes may even exclude them altogether. In Norway, there is no requirement to exhaust all alternative claims, but the failure to do so may affect the application of the general standing requirement that the claimant has a 'real need' to bring the claim.[78]

14 In some legal systems, special – generally shorter than normal – time limits apply to public authority liability claims.[79] But the ordinary burden of proof usually applies,[80] though where an administrative court has already found that the conduct impugned was unlawful, this may create a rebuttable presumption of fault or wrongfulness in the action for damages (even if the finding of illegality does not automatically establish fault or wrongfulness). Where this applies, as in Denmark, it is for the public body to prove *the absence* of negligence.[81] In France, the burden is in principle on the claimant but a variety of legal presumptions may be of assistance, effectively reversing the burden of proof in particular contexts.[82] In Portugal too, also by way of exception to the general rule, the burden of proof may sometimes be reversed: the two situations to highlight are unlawful juridical acts and the omission of duties of vigilance.[83]

15 Amongst other special features of the procedure governing public authority liability claims may also be noted the special, lower interest rate applied to the

74 EW 6 (but very limited scope); IT 54; NL 21. Note also the possibility in some legal systems of getting compensation by way of criminal proceedings: PT 43; ES 39.

75 IS 29.

76 As explicitly provided in Greece by L 1868/1989: GR 11. See also IT 50 f.

77 DK 12, 49; IT 99; PT 39; CH 27. The same is presumably also true in Israel (cf IS 27).

78 NO 11 f.

79 AT 14 (long-stop period of ten rather than thirty years); CZ 32 f (three years from realisation of damage, but only six months for non-material harm, with a long-stop of ten years); FR 14 (four years); GR 12 (two years for claims by State employees against the State); ES (one year); CH 71, 76 (one year); US 15 f (two years for federal claims, also shorter in some states). The ordinary time limits for civil claims are applied in other countries: DK 14; EW 6; DE 20; IS 28; NL 25; NO 11; PL 34.

80 CZ 28, 30 f; EW 6; FR 15; DE 18; IS 26; IT 93 (otherwise where liability is contractual); NL 24; PL 33; PT 42; ZA 5; US 15.

81 DK 13.

82 FR 15 ff (eg in respect of public works and, formerly, clinical negligence).

83 PT 42, 61.

State's judgment debts in Greece – justified by the country's presently acute financial straits.[84]

E. REMEDIES

16 All countries recognise compensatory damages as the principal remedy in public authority liability claims. General principles of the law of damages usually apply.[85] However, a few US states have limited compensatory damages to the amount under which the government is insured against liability for that particular act,[86] a privileging of the State that seems hard to reconcile with the rule of law.

17 Compensation for non-pecuniary loss was accepted in public authority claims only tardily in some places, but is now an established feature of such claims.[87] However, damages under this head do not normally compensate for mere trouble or inconvenience resulting from an invalid decision.[88] In the context of claims of unwarranted detention, it is worth noting that a special per diem calculation approach has found widespread adherence across legal systems, though the daily amounts vary considerably.[89]

18 Punitive damages are available only in England and Wales, Israel, and some US states;[90] other US states have limited their availability, and they are excluded altogether in federal claims.[91]

19 As regards the remedies of compensation in kind and injunctions, a wide variety of approaches are taken. In Austria, the normal remedies of restoration in kind and injunctions are not available, restrictions justified with reference to the need to uphold the separation of powers.[92] For similar reasons, restitution in kind is also generally excluded in Germany, albeit subject to exceptions, but there may be an injunction to restore the status quo ante (*Folgenbeseitigungsanspruch*),

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84 GR 14 f. It must be said that the justification for the denial of prejudgment interest against State defendants in some American states (US 18) is somewhat less obvious.

85 AT 18; CZ 36 ff; EW 7; DE 21; GR 21 f; IS 31; IT 63; NL 26; NO 14; PL 36; PT 48; ZA 8; CH 23 ff.

86 US 18.

87 CZ 41 (since 2006) and see no 48 below.

88 DK 16 (noting possible arguments based on the ECHR to the contrary).

89 AT 60 (between € 20 and € 50 per day for immaterial loss); CZ 39 (€ 6 per day); 5DE 6 (€ 25 per day); 5GR 2 (between € 8.80 and € 29 per day); 5NO 1 (€ 150 for each of the first two days, thereafter € 40 per day); see also 5Comp 14, with further references.

90 EW 7 (referring to *Rookes v Barnard* [1964] AC 1129); IS 34; US 18. The non-availability of punitive damages is specifically mentioned in PL 37; ZA 8.

91 US 18.

92 AT 16.

which can be indistinguishable in effect.[93] In Belgium, compensation in kind is possible, but no injunction may be awarded that infringes the discretionary competence of the public authority.[94] Polish public authority liability law also excludes the issue of an injunction. In England and Wales, injunctions may not be awarded against the Crown insofar as domestic (rather than EU) law is concerned, but they are available against other public authorities.[95] In the Netherlands, injunctions are generally available in public authority liability claims – except where precluded by 'pressing social need'.[96] Injunctions may also be issued in South Africa and, under state law, in the US,[97] and indeed in some US states sovereign immunity limits only claims for damages, not claims for injunctions or declaratory judgments.[98] However, injunctions are not available against public authorities in federal torts claims in the US.[99]

F. POLICY CONSIDERATIONS

20 The brevity of some of the Part I responses under this heading was strongly suggestive that policy argumentation does not play a major role in judicial or academic discourse in the countries in question. It was noted as regards France, however, that – though court judgments are themselves devoid of policy discourse – policy factors have in fact had an impact on the contours of public authority liability, as is evidenced by the *conclusions* formulated by the *rapporteur public*.[100]

1) Policy Orientation

21 In the analysis presented in Part I above, there was an interesting divergence in how the contributors reported the policy considerations given the most weight in their respective jurisdictions. Especially in the common law and mixed legal systems, and perhaps also in Scandinavia, though not exclusively in these places, the policy arguments given most weight are mostly *against* the broad extension of liability: amongst the considerations cited are the need to preserve limited public financial resources, the risk of detrimentally defensive action by public authorities which would threaten the ability to deliver general public benefits

93 DE 21.
94 BE 11. Natural restitution is also available in Portugal and Spain: PT 55; ES 53.
95 EW 7.
96 NL 26.
97 ZA 8; US 17.
98 US 18.
99 US 19.
100 FR 25.

('overkill'), and the conflict between the authority's duty to the public and the (proposed) private duty.[101]

22 Especially in continental Europe, the contrary arguments mainly hold sway, and the emphasis is on the provision of a remedy to injured citizens for State wrongs, ensuring the application of principles of good administration, protection of the fundamental rights of citizens, the fair allocation of risks and harms, loss spreading via the State's 'deep pockets', and incentivising public authorities to promote efficient administration and the overall quality of public service, as well as the avoidance of unnecessary risks.[102] It is also emphasised that the State is in a special position which may legitimately be reflected in the liability rules applied to it: with its extra powers and freedoms come additional responsibilities.[103] A further argument is the analogy to be drawn between public and private enterprises, which may lead to the conclusion that public authorities should be subject to enterprise liability based on organisational failure rather than the liability for fault applying to private individuals.[104]

23 A time dimension is sometimes evident in the policy debate. In some legal systems – for example, Italy – the arguments against extensive liability once held sway but are now discounted.[105] Conversely, in other places, there is a concern that the extension of liability may now have gone too far, requiring a contraction of public authority liability law.[106]

24 As regards specific policy arguments, it is said that limited public budgets and the floodgates and overkill concerns rarely feature in the policy discussion in some countries.[107] But it should be emphasised that even the adoption of a rather extensive liability regime, as in Portugal, does not mean that the need to ensure that public funds are used for their intended purpose has been disregarded.[108]

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101 DK 18; EW 10; FR 25 f; IS 36, 38 ff; IT 76 ff (formerly); NO 21 f; ZA 12; US 20. See also PT 52 and ES 55 (recognition of such arguments notwithstanding, or perhaps because of, broad scope of public authority liability in those countries). In some countries in the civil law tradition, the legislator's desire to protect public servants from a flood of claims so as to leave them undistracted in their tasks may account for their immunity from direct liability to persons affected by their actions: GR 25.

102 DE 22; GR 24; IS 35, 45; IT 79; PL 42 f; PT 53 f; ES 54; CH 28. See also ZA 6 f. Arguments in favour of liability are also emphasised in the EU debate: EU 30 ff. Cf the recognition in IT 80 of the lack of deterrent effect insofar as the public servant responsible for the harm may not bear the consequences. Regarding the incentive effect of liability rules, see in more detail Econ 22 ff.

103 NL 28.

104 CH 30, 95 (referring to art 4.202 PETL).

105 IT 76 ff.

106 NL 33 (as suggested by some commentators). See also EW 3; IS 11 ff.

107 NO 23; PL 44.

108 PT 52.

2) Constitutional Considerations

25 A concern to respect the constitutional separation of powers[109] is evident in various concepts employed to limit the scope for judicial consideration of the reasonableness of administrative decisions, most notably justiciability, discretion and the policy/operations dichotomy.[110] But the separation of powers is not at all a focus of policy discussion in some legal systems[111] and sometimes the argument based on the separation of powers is thought to be misplaced, at least insofar as it 'confuses the substance of administrative decisions with their legitimacy'.[112]

26 A number of contributors referred to 'the rule of law'[113] or an ideal of equality in the treatment of the liabilities of public authorities and ordinary persons.[114] Possibly, this is a factor that has particular resonance in countries that have still vivid memories of emerging from despotic rule, whether in the form of fascism or communism.[115] But it may be noted that the argument of equality cuts two ways: just as it can be used in support of a liability on public authorities *just as extensive* as that on ordinary persons, so too can be used *against* a liability on them that is *more extensive* than on ordinary persons.[116]

27 Another interesting observation is that conceptions of the relationship between state and citizen have changed over the last century: the citizen is now considered the client of public services whose needs have to be met and this is a significant policy driver in the modern law of public authority liability.[117]

3) The Need for Balance

28 As noted, some arguments cut both ways: public authorities should not be deterred from using their powers to achieve public benefit, but the fact they are granted such powers provides reason for holding them responsible for their proper exercise; likewise, their public funding creates a pool from which individuals can be compensated, but at the risk of taking away funds

109 EW 10; IS 46 f; NL 31 f; PT 53.
110 EW 10.
111 NO 23.
112 IT 78.
113 AT 19; EW 1; NL 38; PL 42; PT 3; ES 54. Less explicitly: BE 13. The rule of law is also mentioned in IT 12, but seemingly not in connection with public authority liability.
114 AT 19; EW 2; IS 1; NL 38; CH 28. See also ZA 7. As regards the separate notion of equality in the distribution of public burdens, see no 60 below.
115 See AT 19.
116 The analysis in PT 3 seems to go against this, seeing the rule of law as implying a general State duty to compensate even in cases not specifically catered for by law.
117 ZA 5 f.

from the performance of the authorities' public functions.[118] It is therefore no surprise that contradictory tendencies can be evident at the same point of time, with rival schools of thought calling respectively for expansive and restrictive approaches.[119] Perhaps with this in mind, several contributors emphasised the need for balance in weighing the countervailing arguments.[120]

II. LIABILITY FOR UNLAWFUL CONDUCT OR FAULT

A. BASIC PRINCIPLES

29 In many countries, straddling different legal families, liability relating to public authorities involves merely the application of general principles of tort law to public defendants.[121] Liability is therefore variously founded on the general liability for fault stipulated in the civil code,[122] the general common law tort of negligence[123] or the latter's Romano-Dutch cousin, the *actio legis Aquiliae*.[124] Ordinary rules of vicarious liability play a key role in channelling the liability from the individual public servant to the State or employing body.[125]

30 In other legal systems, there is reliance upon special rules within the fabric of general tort law.[126] Alternatively, the source of public authority liability may be found in a self-contained statute[127] or (largely) stand-alone section of the civil code.[128] In France, the law of public authority liability is remarkable for being an autonomous area of judge-made law.[129] But France is probably unique in this respect. Elsewhere, even where the source of the liability is a special law, general principles are drawn from the general law of tort or civil liability to fill

118 NL 30.
119 DK 20; IS 35.
120 IS 94; PT 54; ZA 12. See also FR 5.
121 BE 15; DK 21; EW 1, 11; IS 50; IT 81 (at least since 1999); NL 37; NO 25; ZA 14; US 22.
122 BE 15 (art 1382 CC); IT 82 (art 2043 CC); NL 37 (art 6:162 CC). Cf CH 40 (fault only a requirement when the State acts as a private person and no rule of strict liability applies).
123 EW 16; IS 1, 51, 54 ff (codified in the Civil Wrong Ordinance); US 22, 26.
124 ZA 8.
125 NL 12; NO 29; ZA 14.
126 EW 19 f (misfeasance in public office); DE 24 ff (§839 BGB).
127 AT 2, 21 ff (*Amtshaftungsgesetz*, AHG); CZ 56 ff (State Liability Act); PT 55 (Law on Public Authorities Liability 2007); ES 3 f, 58 (*Ley de Régimen Jurídico de las Administraciones Públicas y del Procedimiento Administrativo Común*, LRJAP); CH 2, 33 ff (State Liability Act of 1958); For the avoidance of confusion, it should be noted that the State Liability Act 1957 in South Africa simply applies the normal delictual principle of vicarious liability to the State and does not create a distinct and autonomous liability: cf ZA 16. Likewise the Federal Tort Claims Act (FTCA) in the United States: US 22.
128 GR 1 (arts 104–106 of the Introductory Law of the Greek CC); PL 1, 47 ff (arts 417–417[2] CC).
129 FR 2, 10.

the gaps in the special regime.[130] Conversely, even when the source of liability is the general law, special adaptations may have to be made to cater for the special position of public authorities.[131]

31 As regards the 'triggers' for liability, two major approaches are apparent. One is explicitly fault-based,[132] though both fault and unlawfulness may be required as distinct elements.[133] The other is considered to be independent of fault and based only on unlawfulness.[134] Some contributors referred to this as a strict liability.[135] The difference seems stark, but it should not be overstated insofar as, in legal systems where fault is adopted as a basis of liability, it is often considered to consist in the breach of a legal duty.[136] Perhaps more significant is a difference between different fault-based systems: in Belgium and France, for example, public law illegality – including on grounds of procedural irregularity – is sufficient to establish fault, whereas the common law treats its notion of private law breach of duty as distinct from public law illegality.[137]

32 In this context, Spain is something of an outlier, opting to base liability on an abnormality in the delivery of public services rather than misconduct as such.[138] The idea seems to be to focus on general (legitimate) expectations regarding public services, rather than trying to identify a particular legal error.

33 A key but easily overlooked feature of many legal systems is the recognition of some form or other of 'control mechanism' restricting public authority liability even when fault or unlawfulness (or abnormality, as the case may be) can be established. Particular examples that may be highlighted here are the exclusion of liability in Greece where the violated legal norm aims to benefit the public in general rather than to protect individual rights or private interests,[139] and in Spain where the victim had a legal duty to endure the damage.[140] The Dutch theory of 'relativity' and the American 'public duty' doctrine may also be mentioned in this context.[141]

130 AT 21; PL 50; PT 55. Cf where a public authority acts as a private party – the source of its liability is then (generally) the ordinary law: CH 35.
131 DK 22; EW 2; IS 50; NO 26 ff; US 23.
132 AT 43; BE 15; DK 21, 23; EW 15; FR 28; DE 24, 41; IS 51 f, 54 ff; IT 88 ff; NL 37; NO 25; PT 56; ZA 14; US 22 (implicitly).
133 AT 23, 37; DE 26; NO 25; PT 56; ZA 14.
134 GR 26; CH 39, 46 ff.
135 CZ 57; GR 26; PL 2; CH 8. See also NO 15 ff on debate around the issue in Norwegian law.
136 EW 16.
137 Compare BE 17 and FR 28 with EW 12, 15.
138 ES 58.
139 GR 29 ff.
140 ES 58.
141 NL 34; US 24.

B. DEFINITIONS

34 As indicated above, the main concepts used, depending on the legal system in question, are fault[142] and what is variously called wrongfulness or unlawfulness.[143] Sometimes a functionally equivalent term is used – for example, negligence or maladministration.[144] Generally, negligence is sufficient to satisfy the requirement of fault, where this is imposed.[145] Reflecting the standard approach to the subject matter in their own legal systems, some contributors divided their treatment of these ideas according to the function performed: administrative, judicial or legislative.[146] A *faute du service* (abnormal functioning of the service)[147] is somewhat distinct, and perhaps bears more resemblance to the Spanish notion of abnormality in the delivery of public services than to fault as conventionally understood.

35 The notions of fault and unlawfulness are often interlinked in quite complicated ways. In the Netherlands, fault requires both unlawfulness and attributability, but also serves to establish the latter requirement.[148] In Norway, the question of unlawfulness does not arise separately and in isolation but is rather a label to put on the answer to the question of fault.[149]

36 Regarding legal systems in which there is a specific statutory regime of public authority liability, its key components – public authority, office-holder, organ, administrative function, etc – naturally serve to focus discussion, which must accordingly address such concepts as 'a public authority'[150] or 'organ',[151] *Amtsträger* and *Amtspflicht*,[152] administrative function,[153] and the exercise of public authority.[154] Regarding Spain, the main definitional question is what constitutes the abnormal operation of public service;[155] regarding Greece, breach of provisions for the benefit of the general interest must be contrasted with the breach of provisions aiming to protect a certain individual right or simply a

142 AT 43 ff; BE 15 ff; IT 91 ff; NL 47 f; NO 33 ff; PT 68 ff; ZA 25 ff.
143 AT 37 ff (using the term wrongfulness); NL 42 ff; PL 56 ff; PT 71 f; ZA 20 ff (using the term wrongfulness); CH 46 ff.
144 CZ 60 ff (maladministration); DK 22 (negligence); EW 14 ff (negligence); IS 54 ff (negligence).
145 NO 33.
146 BE 15 ff; NL 44, 53 ff; PL 56 ff; PT 71 ff. See also no 44 below.
147 PT 67.
148 NL 47 f.
149 NO 33.
150 AT 26 f.
151 AT 28 ff.
152 DE 38 f.
153 PT 65.
154 PL 52 ff.
155 ES 60 ff.

private interest.[156] In the United States, the main role of public authority liability law is considered to be to provide immunities in respect of governmental functions, as marked out by the binary oppositions 'discretionary-ministerial', 'planning-operational' and 'governmental-proprietary', and these are identified as the key components of the regime.[157] In South Africa, public authority liability is conceived of as primarily vicarious liability, so the rules of vicarious liability therefore provide the framework for analysis.[158]

37 Regardless of the framework adopted, however, it may be noted that in general the ordinary rules of causation apply in the law of public authority liability.[159] The same is mostly also true in respect of the general requirement of damage.[160]

C. DISCRETION AND JUSTICIABILITY

38 It is widely recognised that administrative decision-makers – and *a fortiori* the legislator – are allowed a degree of discretion in the exercise of their powers. It is not the task of the courts to second-guess their decisions, and whether these appropriately balance the competing interests, are apt to assist the pursuit of specific social goals or the general public good, etc, is a matter for the decision-maker, not the judge. This is the ideal of the separation of powers.

39 But when a public authority's conduct causes harm and the victim seeks to recover damages on the basis that the harm was culpably or unlawfully caused, the question arises of how the court can decide on liability without infringing on the authority's area of discretion. Strictly speaking, of course, a decision that damages are payable does not entail in itself the annulment of a prior administrative decision that was causative of the loss or subject the authority to the legal compulsion to amend its conduct.[161] But the practical effect of the judgment may be the same. So, where the claim relates to an administrative decision for which it remains possible to seek annulment, the court in which the claimant seeks damages may declare the matter inadmissible until the annulment application is determined by the appropriate tribunal[162] – and, naturally, may reject the damages claim if annulment is refused. Where the

156 GR 29 ff.
157 US 27.
158 ZA 17 ff.
159 AT 36; BE 15; DK 17; IT 100 (common to criminal and civil law); NL 41, 49; PL 50; ZA 28 f; CH 40, 45.
160 NL 41; CH 41 ff.
161 See AT 49: the court does not interfere with the administrative act but only the resulting damage.
162 NL 14, 20.

claim is founded on general conduct rather than a specific decision, however, annulment is not a practical remedy and it may fall to the court in the damages claim to evaluate the public authority's conduct, applying the prescribed tests of fault, unlawfulness, etc. In a sense, the court is still only ruling on the legality of the public authority's conduct, but the separation of powers becomes blurred inasmuch as the unreasonableness of the conduct or the fault of the actor may itself be a reason, in some circumstances, for regarding it as unlawful.

40 Courts are therefore inclined – even in damages claims – to limit their evaluation of the public authority's conduct with reference to public law notions of discretion[163] and justiciability.[164] In the United States, this is formalised through the 'discretionary function' exception recognised in the Federal Tort Claims Act;[165] elsewhere, the relevant principles were judicially developed. Liability can only be imposed where the subject matter is suitable for judicial resolution (justiciable) and the public authority has abused, failed to exercise or exceeded the limits of its discretion.[166] The two issues are interrelated, and some legal systems have found it helpful to draw the line with reference to the same, admittedly imprecise distinction between planning (or policy) and operational spheres, or between discretionary and ministerial, or governmental and proprietary functions.[167] The binary oppositions posited are correctly seen as two points on a continuum, not as entirely distinct areas; the authority's *margin of discretion* thus increases or decreases depending on which pole is approached.[168] The analysis maintains the formal separation of powers while not exempting public authorities from liability for harm they may cause through culpably or unlawfully conducted activities.[169]

41 Of course, where (as in France) a finding of public law illegality is itself sufficient to establish the necessary fault or unlawfulness, this obviates the need to refer to ideas of discretion or justiciability altogether if the illegality has already been established.[170] But such ideas may be relevant in legal systems

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163 AT 48 f; BE 40; DK 24 ff; EW 21, 24 ff; DE 42 f; GR 34 ff; IS 63 f; IT 101; NL 53 ff; NO 36 f; PL 64; ZA 32 f; ES 65 ff; CH 51; US 28. Discretion and justiciability are said to play no role in Portugal: PT 76. See further 3Comp 8 ff.

164 EW 21, 29 f; IS 62 ff.

165 US 28.

166 AT 48; GR 34; NO 37; ZA 32 f; ES 65 ff. In Switzerland, however, it is argued that not even clear arbitrariness is always sufficient to trigger (public) liability: CH 51.

167 EW 27 f (policy-operation); IS 63 (policy-operation); US 30.

168 NL 54.

169 For express linking of the role played here by discretion and justiciability with separation of powers arguments, see AT 49; EW 10; IS 62 ff; NL 53; PL 65 (in the context of liability for legislative omissions). Cf NO 36, linking discretion with the lack of judicial expertise in the matters the administration must address.

170 FR 36.

in which such a finding does not conclusively establish a basis of liability in damages.[171]

42 It may also be noted that other mechanisms reflect the same underlying policy concerns and may be regarded as functionally equivalent (for example, raising the standard of fault to *faute lourde*[172] or the required unlawfulness to a serious violation of essential duties,[173] or, as in EU law, a 'sufficiently serious' breach[174]).

D. INDIVIDUAL AND INSTITUTIONAL LIABILITY

43 As previously noted (no 3 above), one of the major historical trends in public authority liability has been a move away from the exclusive liability of the individual servant towards the joint liability of the public institution by which the servant was engaged (*respondeat superior*) and frequently its exclusive liability. No modern legal system (at least amongst those included in this survey) treats the liability of the individual servant as exclusive, but there is a divergence of approach as between those systems that make the servant jointly liable with the institution,[175] and those that allow the victim only to claim against the institution, while allowing the institution a limited right of recourse – typically for gross negligence and intentional injury[176] – against the servant.[177] In the latter situation, it is possible to see a policy of channelling liability onto the institution,[178] though the institution's deep pockets serve as a magnet for claims even where the servant bears a notional joint liability. Irrespective of the strict legal position, it would be rare in practice for a civil servant to be sued

171 DK 25 f; EW 14, 20 ff. See also IT 112 (discretion may make it hard to prove damage).

172 FR 33 ff, 45, 47; PT 60, 68 ff.

173 CH 51.

174 EU 41 f.

175 EW 33; FR 41 (where 'dual fault' or *faute personnelle* occurring within the public service); IT 118 ff (limited to where the servant acted with gross negligence or malice); NL 61 ff (but the servant has a recourse claim against the employer unless he acted with malice or gross negligence); NO 38; ZA 34; US 34 (in state claims). In Israel, the servant's direct liability to the claimant is formally preserved, though limited to cases of intention and knowing indifference, but the employing institution can notify the court handling such a claim that the servant was acting in the course of employment and seek to replace the servant as the defendant: IS 67.

176 Cf BE 44 f (also where habitual slight negligence); CZ 83 (only where fault is established in criminal or disciplinary proceedings); PL 69 ff (intentional fault or manifest breach of law).

177 AT 50 f; BE 44 f; CZ 81 ff; DK 30 (assuming the institution has liability insurance or, as is common with public bodies, self-insures); DE 44 ff; GR 38 ff; IS 66 ff; PL 68 ff; ES 73 ff (the servant can be directly liable if found guilty of crime: ES 76); CH 52 ff; US 32 ff (in federal claims, but the FTCA claim is precluded if the employee acted outside the scope of employment: US 33).

178 AT 50; IS 66; ES 75.

personally, or for the employing institution to seek recourse by way of indemnity for damages already paid.

E. RANGE OF APPLICATION

44 A typical subdivision of the field of public authority liability is between administrative, judicial and legislative conduct.[179] Liability for the administration is governed by what may be regarded as the 'default rules' of public authority liability; liability relating to the judicial and legislative processes can be more problematic, and hence subject to particular restrictions (explored further in no 55 ff below).

45 The illustrations given here of the range of application of public authority liability therefore focus on the administrative sphere. In almost all legal systems, the liability extends broadly, encompassing decisions made at both central and local governmental levels, and the activities of a wide variety of public agencies: the police and emergency services, social services, highway authorities, education authorities, immigration authorities, licensing agencies, and regulatory authorities.[180] Typical cases include the failure to maintain public roads,[181] the unlawful grant or withholding of a licence or planning permission,[182] the failure of the police to discharge its duty to safeguard the public,[183] and supervisory failures.[184] In some systems, the or at least a major focus is *decisions* in the narrow sense.[185] Very often the loss compensated is purely economic.[186] In international comparison, however, a conspicuously restrictive approach is taken in England and Wales, and the United States, where general restrictions on liability for omissions and the recovery of pure economic loss are reinforced by a pronounced – perhaps even exaggerated – judicial reluctance to impinge upon executive discretion, meaning that licensing agencies, supervisory authorities and police investigations are largely excluded

179 BE 15 ff.

180 AT 52 ('rather generous'); CZ 84; FR 43 ('broad'); IS 69 ('not restricted to given types of cases'); IT 132 f; NL 66; NO 40; PL 75; PT 80 ('quite wide').

181 AT 53; IT 133, 145 ff; GR 43; PL 77; PT 81; ZA 46. See further Case 3 (missing warning).

182 DK 37. Cf PT 81 (delay). See further Case 2 (wrongfully cancelled licence).

183 DE 47; GR 43; NO 40; ZA 37 f (but cf 42: duty is only to protect against crime, not other hazards).

184 CZ 91; DK 33, 37 ff; IS 71 f; NL 66; NO 27, 41 (special standard applies); ES 81 ff; CH 63. Cf ES 82 f (reluctance to impose liability for supervisory failures). In these cases, the protective scope of the supervisory duty becomes important and may be construed differently in different legal systems: see eg, as regards vehicle road fitness tests, AT 39; DK 39; DE 27 (Denmark but not Austria or Germany protecting the economic interests of the owner). See further Case 1 (negligent safety certification) and Case 4 (fireworks store).

185 CZ 85; DK 33; PL 76.

186 DK 33; ZA 43.

from the field of potential liability.[187] The case studies analysed in Part II of this volume reinforce the thesis advanced by Markesinis et al that the common law is the 'outlier' here inasmuch as no comparably extreme restrictions on the scope of potential liability exist in other legal traditions.[188] The exceptional reluctance of the common law systems to recognise liability is perhaps best illustrated by Case 2 (wrongfully cancelled licence) and Case 3 (missing warning).

F. VIOLATIONS OF HUMAN RIGHTS[189]

46 In some countries, obligations arising under international treaties have effect in national law, so the violation of human rights under (for example) the ECHR can give rise to public authority liability as norms of international law are translated into the domestic legal order, being capable of establishing the unlawfulness or fault of the conduct in question (direct effect).[190] Elsewhere, the infringement of Convention rights is not actionable in national courts without a specific basis in national law.[191] In Denmark and the United Kingdom, however, the rights enshrined in the ECHR are incorporated into national law by statute, which can provide the basis for a compensation claim brought by an individual who has been the victim of a human rights violation by a public authority.[192] Other legal systems provide a specific remedy in respect of delays in the administration of justice. In Italy, where trial delays have frequently incurred the censure of the ECtHR, there is now a statutory right to a fair indemnity,[193] while comparable legislation in Poland also provides for (limited) compensation for delays in the justice system but does not exclude a separate action for damages under the ordinary Code provisions on public authority liability.[194]

47 Within national legal orders, there may also or alternatively be liability for the violation of fundamental rights guaranteed by the constitution.[195] This may act as a catch-all for claims that cannot be brought on any other basis.[196] It seems that claims solely based on the violation of fundamental human rights

187 EW 35; US 36 ff.

188 *Markesinis et al* (fn 4).

189 See further *E Bagińska* (ed), Damages for Violations of Human Rights: A Comparative Study of Domestic Legal Systems (2016).

190 BE 53; FR 49 ff; GR 44; NL 69; PL 83 (but compensation for non-pecuniary loss is subject to limitations); PT 84 f; CH 67.

191 IT 159.

192 DK 47; EW 40. Cf NO 43.

193 IT 158 ff.

194 PL 91.

195 DE 48; FR 51; ZA 48; US 39. Still undecided: IS 80; CH 68. Cf IT 180 (infringement of inviolable and constitutionally guaranteed right a basis for the award of non-pecuniary damages). As regards deprivation of liberty, see no 63 below.

196 ZA 48.

– rather than general heads of damages liability – are rare.[197] More generally, the extent to which recourse to international human rights norms is necessary or desirable depends on the degree of incorporation of such norms in national law. Thus, as the Spanish Constitution of 1978 contains a well-developed list of fundamental rights, there is little practical need to refer to the ECHR, though ECtHR jurisprudence has proved useful in developing the law, for example in the area of noise pollution.[198]

48 In some countries, the law is in a state of uncertain development as to the extent to which claims relating to the violation of basic human rights can be brought as independent claims within the national legal order.[199] But human rights norms, whatever their source, may in any case have indirect effect. Weight may be attached to fundamental rights in the balancing of interests which takes place in the application of ordinary liability law, for example in determining required conduct or what constitutes actionable damage.[200] A specific example would be where a public authority offends a citizen's dignity.[201] In Italy, liability for non-pecuniary damage is limited to specific cases, of which infringement of inviolable and constitutionally guaranteed rights is one, and has been found to warrant the award of damages for frustration, stress and upset caused by – for example – delay in processing a licence or concession application, maladministration in the courts, and the non-collection of waste.[202]

49 Lastly, it should be noted that, as required by the ECHR[203] and under international law, persons who are wrongfully deprived of their liberty by arrest or detention shall have an enforceable right to compensation. This is addressed in no 63 below.

G. DEFENCES

50 General defences to civil liability mostly apply to claims of public authority liability too,[204] though sometimes with an element of variation.[205] In France, there is a formal difference between the defences applied by the administrative

197 CZ 95 ff; DE 48.
198 ES 84.
199 IS 80; NO 43; CH 68.
200 IS 81 (negligence); NO 44; ES 84 f (noise pollution).
201 IS 81.
202 IT 162 ff. But the Supreme Court in 2008 found some of the earlier decisions to be 'questionable' and promulgated a more restrictive approach: IT 165 f.
203 Art 5(5) ECHR.
204 AT 64; BE 54; EW 41; GR 46; IS 82; IT 169; NL 73; NO 45; PL 93, 96 f; ZA 49; CH 71 ff; US 40.
205 AT 14 (time limits); CH 76 (time limits); IT 169 (to the extent discretion is a defence); US 40 (some procedural distinctions).

courts in public authority liability claims and those applied by the ordinary civil courts, but the substance is similar.[206] In Spain, there are on paper only two defences available under the statutory public authority liability regime: exclusive fault of victim and force majeure.[207] But the victim's *contributory* (rather than exclusive) fault may also reduce or even exclude liability.[208] This is a matter of express provision in the statutory scheme in Portugal, which also admits some special defences in respect of liability for judicial and legislative functions.[209] Excepting time limits (see no 14 above), contributory fault is the only classical tort law defence unambiguously accepted by the courts of the EU.[210] The important role played by contributory fault is also stressed in several other reports,[211] as is statutory authorisation – a defence which has obvious pertinence in the public authority liability context.[212]

51 In some countries it is a defence that the claimant failed to exhaust all available appeal, complaint, etc, procedures before claiming on the basis of public authority liability: if it is possible for the claimant to seek the annulment of what the public authority has done, this must be done prior to claiming.[213] Elsewhere, the failure to exhaust alternative mechanisms is not strictly a defence but the claimant's failure may amount to contributory fault,[214] while in common law systems the existence of such alternatives may be a reason for the court to refuse to recognise a duty of care.[215]

52 Some other specific defences may also be noted. It is a defence in some legal systems that the victim's loss would have occurred in the same way even if the public authority had acted lawfully (lawful alternative conduct, hypothetical causation)[216] – which is obviously of major significance insofar as unlawfulness resided in a procedural error. Another, especially significant defence to liability is recognised in Germany: where a civil servant acted merely negligently (even with gross negligence) neither he or she nor the employing public corporation is liable if there is another source of redress for the claimant.[217] This may be considered alongside other 'control mechanisms' limiting the extent and the stringency of public authority liability elsewhere (see no 33 above).

206 FR 52.
207 ES 86.
208 ES 95.
209 PT 88 ff.
210 EU 48.
211 AT 64; DK 52; DE 53; IS 82; PL 97; PT 89; ZA 50; CH 73 ff.
212 EW 41; ZA 49.
213 CZ 102; DE 52; PL 98 (unlawful judgments). See also no 12 above.
214 DK 52; IT 91 ff, 172. See also no 13 above.
215 EW 42. See also no 11 f ('real need' standing requirement).
216 AT 64; PL 94 (limited as regards historical expropriations).
217 DE 51 (§839 (1) BGB).

H. SPECIAL CATEGORIES OF CASES

1) In General

53 The main categories of public authority liability warranting special consideration are liability in respect of the judicial and legislative functions (see nos 55 f and 57 ff below). But in fact in apparently all legal systems there is a wide variety of special rules regarding particular public authority actors or activities. A diverse set of (full or partial) immunities are listed in the contributions in Part I, but should not be taken to provide an exhaustive account. They are just illustrations of what in most, perhaps all, legal systems is a much bigger category, containing such items as the personal immunity of the monarch,[218] members of parliament,[219] and holders of high ministerial office (in respect of government acts).[220] Limitations on the liability of financial market supervisory authorities[221] and postal services[222] are probably more frequent than is specifically mentioned in these pages. In the common law a 'combat immunity' bars tort claims by military personnel on active duty for injuries suffered incident to military service, as well as claims by 'collateral victims'.[223]

54 Conversely, there may also be special rules *establishing* the damages liability of public authorities in specific circumstances – for example, relating to those guilty of crimes while in public office.[224]

2) Judicial Functions

55 There is clearly a public interest in the finality of litigation and the avoidance of indirect challenges to judicial decisions in the form of actions for damages premised on the making of an error in a previous decision.[225] Consequently, several systems exclude liability in respect of court judgments;[226] other systems limit liability to particularly serious types of case.[227] Elsewhere, a broader liability

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218 BE 55.

219 IS 86; NL 85; PT 96; ZA 52 (immunity from defamation actions).

220 FR 55; NL 85.

221 CH 81. Cf ES 81 ff (addressing the issue as one of discretion). For a pan-EU survey, see *RJ Dijkstra*, Liability of Financial Supervisory Authorities in the European Union (2012) 3 JETL 346.

222 EW 44.

223 EW 45; IS 84 (statutory immunity for 'war operations'). Cf CH 85 ff.

224 PT 97.

225 NL 57; ES 101. For further comparative analysis, see *A Ohlenburg*, Die Haftung für Fehlverhalten von Richtern und Staatsanwälten. im deutschen, englischen und französischen Recht (2000); *KM Scherr*, The Principle of State Liability for Judicial Breaches (doctoral thesis, European University Institute, 2008); *ead*, Comparative aspects of the application of the principle of State liability for judicial breaches (2012) 12 ERA Forum 565.

226 AT 65 (Supreme Court); EW 43; US 36, 42. As to the range of different approaches, see also the analysis of Case 5 (unfounded criminal charges) in Part II, especially 5Comp 4 ff.

227 DE 55 (perversion of justice).

for judicial decisions is recognised, sometimes with an adapted requirement of 'fault' or 'error',[228] though the damages recoverable may be limited as a general rule to the cost of correcting the judicial error on appeal,[229] which seems to exclude compensation for consequential losses. A frequent complementary measure is a requirement that the judgment in question should have been annulled in independent proceedings.[230] Legal systems may also restrict liability arising in respect of other judicial functions to cases of malice or bad faith.[231]

56 Liability for judicial decisions is sometimes limited to (sufficiently serious) violations of a superior norm of national or supranational law, in which case it cannot arise simply on grounds that the judge made a gross error in assessing the facts or identifying the legal rule to apply to them, or even if the judge acted with bias or otherwise in bad faith. Some national legal systems envisage an immunity of such an extent.[232] However, no such limitations exist in other national laws, which conceive of liability for judicial decisions more expansively still. In Portugal, liability extends beyond judicial decisions which are manifestly unconstitutional or illegal and encompasses decisions which are unjustified due to a gross error in the assessment of the facts.[233] Comparably, in Spain, liability can arise in respect of a manifest and clear mistake in the determination of the facts as well as in the application of rules that do not exist or that are interpreted in a nonsensical way.[234]

3) Legislative Functions

57 For readily understandable reasons connected with the doctrine of the separation of powers, several legal systems straddling different legal families exclude the enactment of primary legislation from their general regimes of public authority liability.[235] Some states exclude liability even in respect of secondary legislation.[236] Conversely, liability may be accepted where there is a breach of an international treaty in those jurisdictions in which treaties give rise to norms effective in the national legal order.[237] In a few countries, liability in

228 FR 47; IT 174 f; NO 41; PT 74, 78, 98; ES 97 ff; CH 48, 51, 81. Cf BE 23 ff (ordinary test of fault under art 1382 CC); CZ 79 (ordinary test applied).

229 DK 45 f.

230 BE 26 ff; PT 49 (but this requirement has been judged to be contrary to EU law insofar as it prevents the recovery of compensation for an infringement of rights stemming from the principle of Member State liability: Case C-160/14, *Ferreira da Silva e Brito v Estado português*, 9 September 2015).

231 EW 43 (knowing excess of jurisdiction); ZA 36.

232 EW 44 (immunity except where the judge knowingly acts without jurisdiction).

233 PT 53, 74, 98.

234 ES 101.

235 AT 65; EW 43; DE 46; IS 69; ZA 35, 52 ('probably'); US 36 f, 42. For further comparative analysis, see *L Tichý/J Hrádek* (eds), Staatshaftung für legislatives Unrecht (2012).

236 IS 69; US 36 f, 42.

237 BE 17; DK 33; FR 46, 59; GR 53; NL 85; PL 72.

respect of legislation seems not to be subject to particular restriction – or is at least more widely recognised.[238] Here, liability may be contemplated even for a legislative omission.[239]

58 As might be expected, liability for secondary and local legislation (regulations, orders, bylaws, etc) is more broadly conceived,[240] though not universally recognised.[241]

59 Under EU law, of course, liability can arise in respect of enacted legislation that violates a Treaty provision, Regulation or Directive.[242] The same may also be true in respect of other supranational legal orders, though sometimes such liability can be excluded by national law.[243]

III. LIABILITY FOR LAWFUL CONDUCT

A. PRINCIPLES

60 The obligation to compensate for injury caused independently of misconduct or abnormal risk is to be found in many national systems, resting on such theories as *égalité devant les charges publiques* (equality in the distribution of public burdens)[244] and the *Sonderopfertheorie* (special sacrifice theory).[245] Substantially the same idea was stated in Principle II of the Council of Europe Committee of Ministers' Recommendation on Public Liability of 1984:

> 'Even if the conditions stated in Principle I are not met [viz "a failure of a public authority to conduct itself in a way which can reasonably be expected from it in law in relation to the injured person"], reparation should be ensured if it would be manifestly unjust to allow the injured person alone to bear the damage, having regard to the following circumstances: the act is in the general interest, only one person or a limited number of persons have suffered the damage and the act was exceptional or the damage was an exceptional result of the act.'

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238 BE 8, 34 ff (art 1382 CC applied); GR 53 (violations of constitution); PL 75, 87; PT 81 f (but cf 91 ff).

239 BE 52; PL 62, 87 (requirement of a duty to enact); PT 92 (if unconstitutional).

240 BE 39; NL 85.

241 IS 69; US 36 f, 43.

242 EU 62, 78.

243 Eg the UK's Human Rights Act does not allow the imposition of liability in respect of legislation violating the ECHR: EW 44.

244 BE 68; FR 58 ff; 68; NL 93 ff, 103; CH 82. Cf EU no 51. See further the analysis of Case 6 (unpasteurised cheese) and Case 7 (police cross-fire) in Part II, especially 6Comp 12 f and 7Comp 5 ff.

245 DE 5, 57 f; PL 92, 100 f; PT 102 f; CH 82, 91.

61 Spanish law goes further, recognising the normal operation of public services as a source of liability.[246] Other systems have no general principle of this nature, though they may provide for the payment of compensation in particular types of case.[247] In Poland, under the Civil Code compensation for personal injury can be ordered against any defendant on the basis of equity;[248] in this context, the former need to identify a general interest that was pursued by a public entity has recently been abandoned.[249] The Anglo-American common law, which largely sets its store against liability for lawful conduct,[250] is here significantly out of step with positive law and widespread opinion elsewhere. So too, arguably, is EU law – the Court of Justice having rejected the liability of the Union for lawful acts in its *FIAMM* judgment of 2008.[251]

62 The law of expropriation also has obvious relevance in this context,[252] though it is more usually thought of as an aspect of property or even constitutional law than tort law.[253] Closer to the concern of tort law as traditionally conceived is the liability recognised in some jurisdictions for administrative actions or legislation with what may be termed quasi-expropriatory effects: there is no taking as such, but the value of the victim's property is diminished.[254] In German law, one speaks here of *Haftung aus enteignungsgleichem Eingriff* – liability for an expropriation-like intervention.[255] In this context, Danish Supreme Court decisions in 1999 may be highlighted as recognising for the first time in that country that persons on land neighbouring an area acquired by the State for development were entitled, on the basis of the principle of equality, to compensation for disturbance they thereby suffered.[256] In stark contrast, the common law (at least in England and Wales) recognises no overriding constitutional principle preventing the expropriation of property without compensation, though there may be specific statutory provision for compensation in particular circumstances.[257]

246 See especially ES 115 f.

247 AT 66 ff; CZ 103; DK 51 ff; EW 47 f; GR 54 ff; IS 57 ff; IT 181 ff; NO 51 ff; ZA 53 ff; US 43 ff; EU 53.

248 PL 105.

249 PL 114.

250 EW 47, 49; US 43. See also ZA 53. In Israel, the courts have so far left it open whether liability for harm caused by lawful activities is warranted on the basis of the equality principle: IS 90.

251 EU 53, referring to Joined cases C-120/06 P and C-121/06 P, *Fabbrica italiana accumulatori motocarri Montecchio SpA (FIAMM) v Council and Commission* [2008] ECR I-6513.

252 AT 79 f; BE 74; DK 52; DE 56; GR 57 f; IS 91; IT 191; NL 87; NO 51; PL 106 ff; PT 11, 102; ZA 54; ES 105 ff, 110; CH 83 ff; US 46 ff.

253 DK 4; GR 58; IS 91; US 46.

254 ES 116, 129. See also IT 192. Cf CH 83: 'virtual' expropriation.

255 DE 2, 36. Also recognised in Greece: GR 23. It may be questioned whether this is appropriately classified as a liability for lawful activities: DE 36 (liability requiring no fault, but there must be unlawful infringement of the claimant's property right).

256 DK 52. See also NL 87.

257 EW 48.

63 Other specific examples that may be mentioned here include strict liabilities on the state in respect of vaccine damage[258] and harm caused to innocent victims of lawfully conducted police operations.[259] It may also be noted that art 14(6) of the International Covenant on Civil and Political Rights, to which 168 states are party (including all those in this study), requires that there should be a legal entitlement to compensation in respect of criminal convictions that are reversed, or for which the convicted person is pardoned, on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, unless it is proved that the non-disclosure of the unknown fact in time was wholly or partly attributable to the convicted person. This obligation overlaps substantially but not completely with that arising under art 5(5) ECHR.[260] These international obligations are fulfilled by the recognition of specific rights to compensation for unwarranted imprisonment in the legal systems covered by this study.[261] Such rights are typically – though not universally[262] – more extensive in scope than those required as a matter of international law.

B. JUSTIFICATIONS

64 To some extent, it is redundant to seek an underlying justification for the imposition of liability for harm caused by lawful activities under the principle of equality in the distribution of public burdens or the theory of special sacrifice. The principle contains its own justification: it is regarded as self-evident that no single member of the community, or group, should be left to suffer excessive damage without compensation as the result of action taken for the general benefit of the community.[263] Perhaps the question to ask is: why is the same justification for liability for lawful activities not regarded as self-evident in the legal systems that do not accept it? The answer may lie in differences in conception of the role and responsibilities of the State. In some countries, especially in the common law world, the 'rule of law' is interpreted as entailing the *equivalence* of public

258 Statutory schemes: AT 68 f, 78; EW 47; FR 56; IS 90; IT 194; US 53. Strict liability for vaccinations recognised judicially: BE 76, NO 54. PL 114. For an international comparison, see *C Looker/H Kelly*, No-fault compensation following adverse events attributed to vaccination: a review of international programmes (2011) 89 Bulletin of the World Health Organisation 371.

259 See the analysis of Case 7 (police cross-fire) in Part II, especially 7Comp 8 ff.

260 Art 5(5) ECHR provides: 'Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.'

261 AT 55 ff; BE 32; CZ 58; DK 53; EW 47; FR 56; DE 49 and 5DE6; GR 56; IS 30; IT 156 f; NL 77; NO 53; PL 102; PT 28; CH 88. See also the analysis of Case 5 (unfounded criminal charges) in Part II, especially 5Comp 12 ff.

262 Cf the language of the English statute, which is drawn directly from the International Covenant: see EW 47.

263 BE 84; DE 58; GR 59; NL 102; NO 56 f. See also IS 92.

and private actors and their subjection to the same principles of liability in damages.[264] But elsewhere the ideal expressed in the German term *Rechtsstaat* ('state of law' or, better, 'state subject to law') is construed more broadly so as to emphasise the distinctions between public authorities and private persons, and to provide a basis for the recognition that the former have special responsibilities towards the latter.[265]

IV. CONCLUSIONS

65 This concluding section first considers the evaluative remarks made by contributors to this volume in their own conclusions (A), before attempting to draw some comparative conclusions from this research (B), then finishing with a few words about the prospects for a set of European principles of public authority liability (C).

A. CONCLUSIONS REGARDING SPECIFIC LEGAL SYSTEMS

66 Many contributors to this volume expressed general satisfaction as to the existing state of public authority liability law in their respective legal systems.[266] In Austria, the topic is not much discussed today and there is said to be no need for general legislative action, though specific reforms may be desirable to achieve a more harmonious overall system.[267] In Greece, the law is considered 'quite satisfactory' but there is room for improvement, especially through re-introducing the personal liability of organs themselves when at fault and abolishing the existing restriction relating to the violation of provisions exclusively existing in favour of the general public interest.[268] Particular problematic areas are also highlighted in other jurisdictions where the law is generally considered to be in a good state.[269] In Denmark, a tension in the existing law is highlighted inasmuch as fundamental policy considerations seem to pull in different directions.[270]

67 Coming at things from a very different perspective, it is noted that state liability in the United States is stringently limited to an extent that might seem

264 EW 1.

265 The term *Rechtsstaat* is not in fact used in the country reports, but as regards the fundamental ideas, see AT 19; DE 23; NL 38; PL 43; PT 2 f; ES 3.

266 AT 81; CZ 105; GR 60; NO 61; PL 118; PT 109 ff; CH 89.

267 AT 81.

268 GR 60 ff.

269 NO 58 ff; PT 112; CH 89 ff. See also BE 83, posing the question whether liability should be made independant of fault.

270 DK 58.

irresponsible to Europeans. However, despite intermittent criticism of the system by some American legal academics, it is suggested that the American citizenry generally appear to be comfortable with the broad governmental immunity that is currently applied.[271]

68 Greater negativity about the current state of the law is to be found elsewhere. In England and Wales, there is constant criticism of the state of the law, and the Law Commission recently issued proposals for radical reform, but these were rejected by the Government – perhaps mindful of the likely impact upon the financial resources at its own disposal.[272] A need for reform is also highlighted in Germany, where it is said that the law of public authority liability is far from satisfactory: it lacks clear and general guiding principles, and the multiplicity of different sources of liability is too complex and suffers from a lack of transparency.[273] The complexity of public authority liability law in the Netherlands is also noted, as well as its lack of clarity about which courts are responsible; a legislative reform has recently been adopted, though not yet fully implemented, and it remains open to question whether it will effect the desired clarification.[274] Legislation is also considered desirable in Norway, in particular because of the lack of clarity about whether a special more lenient standard of conduct applies to particular spheres of public authority activity.[275] In Spain, there has been severe criticism of liability for the normal operation of public services, a liability regime thought to be unknown in any other legal system, but no major change is in sight.[276] As regards Israel, it is said that the expansive approach to public authority liability taken in the 1980s and early 1990s pushed its boundaries beyond desirable limits, with the ignoring of the important distinction between acts and omissions, and that a more restrictive approach should be restored.[277] The different perspectives from which these criticisms are made demonstrate very clearly the range of views to be found – not just across legal systems but also within individual jurisdictions – about the proper shape and orientation of public authority liability law.

B. COMPARATIVE CONCLUSIONS

69 By way of comparative conclusion, drawing together particular strands from the earlier chapters of this book, the following matters will be addressed: 1. *Classification* (is the law of public authority liability public law or private law?);

271 US 55.
272 EW 50 ff.
273 DE 59.
274 NL 103 ff.
275 NO 58 f.
276 ES 117 ff.
277 IS 94.

2. *Degree of particularisation* (is the law of public authority liability special law or general law?); and 3. *Policy orientation* (insofar as the law of public authority liability is 'special', do the factors which make it so point towards a liability that is narrower than the liability of persons generally or more extensive?).

1) Classification: Public Law or Private Law?

70 In respect of the question whether State liability law is public law or private law, a number of constellations are conceivable and indeed present within the Continent's legal orders. Amongst the varied classifications of this subject matter, four basic models may be identified.[278]

71 *First*, there is *the public law model* adopted, for example, in France, where the law of public authority liability was developed and continues to be applied by the administrative courts (in the last resort by the *Conseil d'Etat*) and represents a distinct and autonomous corpus of law.[279]

72 *Secondly*, there is *the private law model*. Strikingly, this model may be found to be instantiated just on the other side of France's northern border, in a country that draws significantly from the same well of legal inspiration. In Belgium, public authority liability is determined in the civil courts relying directly on art 1382 and on other generally applicable provisions of the civil code.[280]

73 This private law based approach shares something with the approach taken in England and Wales, where public authority liability is in practice governed by the generally applicable torts of negligence, breach of statutory duty and false imprisonment,[281] though there does exist one specific cause of action applying only to public defendants, namely, misfeasance in public office,[282] while 'oppressive, arbitrary or unconstitutional actions by the servants of government' constitutes one of only two categories in which exemplary damages are available

278 We may note in passing that this categorisation differs quite markedly from that advanced by another recent study, led by *Oliver Dörr*, whose classification focuses not on the public/private nature of the liability but on the legal structures employed: *O Dörr*, Staatshaftung in Europa: Vergleichende Bestandsaufnahme, in Dörr (fn 4), who at 4 ff identifies the following categories: *zivilrechtliche Deliktshaftung*, *adaptierte Deliktshaftung (Amts- oder Arbeitgeberhaftung)*, *reines Richterrecht*, *spezialgesetzliche Kodifikation*, and *ergänzende Haftungsformen*.

279 FR 2, 10. Of the other countries in this study, those that come closest to this approach are Portugal and Spain, with their rather self-contained public authority liability statutes applied exclusively by the administrative courts.

280 BE 3 ff. For a striking illustration in the context of liability for legislative acts, see BE 37 ff, referring to Cour de cassation/Hof can Cassatie, 10 sept 2010, F.09.0042.N.

281 EW 14 ff. This approach is also found in Israel, South Africa and the United States insofar as public authorities are subjected to ordinary tort liabilities but with modification. More hesitantly, one might also say the same of Denmark, Italy, the Netherlands and Norway.

282 EW 19 f.

under English common law.[283] To that extent, principles of public liability are structurally embedded within English private law, which is the third model I wish to identify here (*public liability embedded in private law*).

74 The embedding of public liability within private law is also to be found in Germany,[284] though a more genuinely *hybrid approach* is to be found there than in England and Wales – exemplifying the fourth and last of the models I wish to identify. In Germany, the starting point in public authority liability is the application by the civil courts of provisions of the Civil Code, though relying chiefly on a Code provision (§839 BGB) that imposes liability specifically for a civil servant's breach of official duty.[285] The Civil Code itself thus makes special provision for the liability of public officials to differ from that of persons generally, in a way not dissimilar to that in which misfeasance in public office operates in the common law of torts. But German law goes further because the Code liability is transformed by the application of principles of constitutional law – in particular, art 34 of the German Constitution (*Grundgesetz*) – in order to transfer the liability from the individual officials who are the addressees of the Code provision to the State as such and its emanations.[286]

75 Of course, numerous variations upon these four main models, and combinations of them, are to be found in the European legal orders, and indeed in other parts of the world, and the lines between them are often quite fine and open to disputation.[287] But that does not detract from the fundamental point that how public authority liability is *categorised* (public or private) seems to have very little impact upon what *substantive* principles are applied or the law's policy orientation. This is most strikingly shown by comparing French and Belgian law, where the substantive principles of liability are rather similar, even though in France public authority liability is conceived as public law while in Belgium the

283 EW 7 (referring to *Rookes v Barnard* [1964] AC 1129).

284 The hybrid approach can also be seen in other legal systems where public authority liability is based on separate legislation or a distinct and separate chapter of the civil code, as in Austria, the Czech Republic, Greece, Poland, and Switzerland.

285 DE 24 ff, discussing §839 BGB, which reads (in translation): Liability in case of breach of official duty (1) If an official intentionally or negligently breaches the official duty incumbent upon him in relation to a third party, then he must compensate the third party for damage arising from this. If the official is only responsible because of negligence, then he may only be held liable if the injured person is not able to obtain compensation in another way. (2) If an official breaches his official duties in a judgment in a legal matter, then he is only responsible for any damage arising from this if the breach of duty consists in a criminal offence. This provision is not applicable to refusal or delay that is in breach of duty in exercising a public function. (3) Liability for damage does not arise if the injured person has intentionally or negligently failed to avert the damage by having recourse to appeal.

286 DE 34, 44.

287 For example, from a Swiss perspective, it may be said that a public law model is adopted formally but in substance public authority liability – at both federal and cantonal level – is largely governed by the principles which apply in (private) tort law: CH 13, 40.

ordinary provisions of the *Code civil* are applied.[288] Further, though Belgium shares with England and Wales an approach in which the liability principles applied to private persons are simply extended to the State and its institutions (in England and Wales, with a little bit of supplementation), their policy orientation could not be more different.

2) Degree of Particularisation: Special Law or General Law?

76 Whatever the doctrinal classification adopted, it must therefore be considered whether *in substance* the liability of public authorities involves merely the application to public defendants of the same general principles as govern liability in the ordinary law of tort, and to what extent it relies upon special rules. This calls for an inquiry into what might make public bodies special so as to warrant separate attention. Amongst the plausible answers are the range of special powers they are granted (which increases the vulnerability to them of ordinary people); the special responsibilities they have as the recipients of public funds; their accountability through the legislative, political or democratic process (and what this means for their accountability through private law); the doctrine of the separation of powers (which defines the role of the courts relative to the legislature and the executive); and the need to allow the efficient delivery of public services.[289]

77 In fact, almost all legal systems – including those systems that adopt a primarily private law approach to the liability of public authorities – seem to admit at least some, often quite significant departures from the approach taken in adjudicating the liabilities of private persons. A number of examples can be found, including the following:

- The recognition of special bases of liability for public authority misconduct, for example under §839 BGB[290] or the common law tort of misfeasance in public office.[291]
- The availability of different measures of damages against public authorities, for example in England and Wales, where exemplary (ie punitive) damages may be awarded in respect of 'oppressive, arbitrary or unconstitutional actions by the servants of government',[292] but not in respect of equivalent actions by large corporations or powerful individuals.[293]

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288 The similarity is most evident in the resting of liability on fault which can be established by any form of illegality: BE 17; FR 28.

289 See no 20 ff above. For further comparative discussion, see *C van Dam*, European Tort Law (2nd edn, 2013) §§1801–1, 1809 f.

290 DE 24 ff.

291 EW 19 f.

292 EW 7 (referring to *Rookes v Barnard* [1964] AC 1129). There is no comparable public-private distinction in the award of punitive damages in Israel: IS 34 (available in general tort law).

293 EW 7 note.

– The application of principles ('control mechanisms') which limit the circumstances in which a public authority can be held liable – confining their liabilities more narrowly than the liabilities of persons generally – or which limit the extent of such liabilities as do arise (see no 33 above). In this context one might mention a number of functionally equivalent ideas. First, there is widespread acceptance that actions and decisions within the scope of a public authority's *discretion* cannot constitute a breach of duty unless the discretion has been abused (see no 38 ff above). The heightened fault requirement applied to public authorities in some countries performs a similar role, for example in France, where a general requirement of *faute grave* was once generally accepted, though its role today is more limited.[294] Of continued and undoubted relevance today, however, is that many legal systems, even where there is no general raising of the fault hurdle, have introduced a heightened fault requirement in respect of particular public authorities – for example, financial supervisors: one study found that half of the financial supervisory authorities in Europe were subject to special liability rules restricting liability to cases of gross negligence or bad faith, or recognising a general immunity from liability.[295]
– Another special technique, also serving to limit the scope of the liabilities that public authorities bear in practice, is *subsidiarity*, whereby liability arises only if compensation is not otherwise obtainable. For example, under §839 BGB, the liability in respect of damage caused by a public official's negligent breach of official duty arises only 'if the injured person is not able to obtain compensation in another way'.[296]
– Conversely, the liability of a public authority may be distinguished from that of persons generally insofar as it is *easier* to establish because generally applicable requirements of ordinary civil liability do not apply to public authorities. For example, the basis of liability may be transformed from 'fault' to 'breach of official duty' with the result that less if any allowance is made for the 'personal equation' of the person performing the public task (his or her degree of skill, age and experience, or level of fatigue).[297] To that extent, public authority liability is seen by some as strict liability even where it rests on a breach of duty. Further, many countries recognise a special liability on the State for harm caused to the inevitable victims of acts done for the general public good, for example under the principle of *égalité devant les charges publiques* or the *Sonderopfertheorie*; this is even more clearly a

294 FR 33 ff, 45, 47.

295 *Dijkstra* (2012) 3 JETL 346. See also *D Nolan*, The Liability of Financial Supervisory Authorities (2013) 4 JETL 190.

296 DE 31. §839 (1) 2nd sent BGB provides (in translation): 'If the official is only responsible because of negligence, then he may only be held liable if the injured person is not able to obtain compensation in another way'.

297 See no 31 above and 1Comp 4.

> strict liability on the State that has no parallel in the liabilities applying to persons in general.[298]

78 There therefore appears to be a measure of consensus in Europe and elsewhere on the globe that public authorities merit special attention – if not necessarily what sort of special attention is justified or required. The degree of particularisation of public authority liability in a given legal system is no indicator of its basic *policy orientation*. Legal systems sometimes apply special liability rules to public authorities to *limit* the liabilities they face relative to persons generally, and sometimes to *extend* them.

3) Policy Orientation

79 Ultimately, it must be asked whether – as a matter of general *policy orientation* – the factors that make public authority liability 'special', and justify particular legal regulation, point towards a liability that is narrower than the liability of persons generally or more extensive. Earlier studies have presented the law of different European states as moving along parallel paths, discarding former limitations of liability and embracing liability of wider scope. For example, Bradley and Bell in 1991 summarised the results of their own comparative survey as follows:[299]

> 'The general picture which emerges … is of a widening of governmental liability. Immunities are declining and the grounds for obtaining compensation … are expanding. This trend is likely to continue.'

Our research shows a further widening of governmental liability in many legal systems but also highlights the need for caution in seeking to identify international trends as there may in fact be quite considerable differences in the 'direction of travel' of different national regimes. While some are still moving in the direction of 'more and broader' liability, others are retrenching with the feeling that previous expansions were perhaps pushed too far.[300]

80 Van Dam has claimed that there is a 'rift' between the 'reluctant' approach to public authority liability taken by English law and the more expansive approaches taken in France and Germany.[301] There is a measure of truth in this characterisation, which can be extrapolated to some extent to common law and civil law jurisdictions more generally, even if the full picture – as one might expect – is rather more complex than such a stark contrast makes it appear. Nevertheless, the analyses of hypothetical cases undertaken in Part II of this

298 See no 60 above. See further *van Dam* (fn 289) §§1802–3, 1803–1 and 1811.
299 *AW Bradley/J Bell*, Governmental Liability: A Preliminary Assessment, in: id (fn 4) 15.
300 See further no 21 ff above.
301 *Van Dam* (fn 289) §1811.

book lends support to the claim, reinforcing the results of previous research by a team of English, French and German scholars led by Basil Markesinis.[302] That study took a selection of English cases and compared how other systems would analyse them. The cases[303] were chosen as examples of the effective 'immunity' that English law gives to wide areas of governmental activity through limits on the existence and scope of a 'duty of care'.[304] Markesinis et al found that no remotely similar immunities were recognised in any other of their selected jurisdictions, and that examples of liability actually being imposed in comparable circumstances were generally not at all hard to find. As noted above (no 45), the analysis of the hypothetical cases undertaken for the present project in Part II of this book confirms and buttresses that finding. The common law's propensity for categorical bars to liability – also apparent in the discretionary function immunity in the United States[305] – is well illustrated by Case 2 (wrongfully cancelled licence) and Case 3 (missing warning).[306]

81 A specific factor underlying the restrictive common law approach in many cases is a general reluctance to compensate for pure economic loss.[307] As is widely known, no such reluctance is to be found in many other legal systems, notably France and other legal systems that adopted the Napoleonic Code or a variant of it. Even where, as in Germany, negligently inflicted pure economic losses are not generally recoverable, an exception is made in the law of public authority liability. Thus it is that §839 BGB speaks only of 'damage arising from [an intentional or negligent breach of official duty]'; there is no need to demonstrate unlawful infringement of one of the protected interests specified in §823 (1) BGB. The claim under §839 BGB thus opens the door to the recovery of pure economic losses that are not recoverable from persons generally.[308] There, and in most other jurisdictions, public authority liability for pure economic loss is in no way controversial and may even be a predominant characteristic of such liability.[309] In the common law, by contrast, the 'no duty' rule in respect of pure economic loss is applied to public and private defendants alike.[310]

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302 *Markesinis et al* (fn 4).

303 The English cases were *Hill v Chief Constable of West Yorkshire* [1989] AC 53, *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633, *Elguzouli-Daff v Commissioner of Police of the Metropolis* [1995] QB 335, *Stovin v Wise* [1996] AC 923 and *W v Essex County Council* [2001] 2 AC 592.

304 EW 16, 35.

305 US 28 ff.

306 See 2Comp 1 f; 3Comp 3 ff. See also 4Comp 4 f.

307 See further 2Comp 2 f. For general comparative analysis, see *M Bussani/VV Palmer*, Pure Economic Loss in Europe (2003); *W van Boom/H Koziol/C Witting*, Pure Economic Loss (2004).

308 DE 30. In other continental legal systems, too, claims of public authority liability predominantly concern pure economic loss: see DK 33; CH 47. More conservative: AT 32.

309 See eg DK 33; CH 47.

310 EW 7 (and see further *Jain v Trent Strategic Health Authority* [2009] 1 AC 853); US 22 (FTCA seemingly excludes claims for pure economic loss). A conservative attitude towards pure

82 More broadly, a clear difference of approach between common law and continental legal systems is found in their attitude to the (strict) liability on the State and public authorities for harm caused to the inevitable victims of acts done for the general public good (*égalité devant les charges publiques*, *Sonderopfertheorie*), to which Anglo-American common law has traditionally been opposed.[311] It may be hoped that the time has now come to reconsider that opposition in the light of the successful experience of liability under these theories elsewhere.

C. EUROPEAN PRINCIPLES OF PUBLIC AUTHORITY LIABILITY?

83 As mentioned at the outset of this chapter, the European Group's project was distinctive in addressing the desirability of common 'principles of public authority liability' which could provide a model for legal development at national and supranational level. The Group's view at the time of the publication of the PETL in 2005 was that no recommendation should be made as regards State or public authority liability because this area is strongly influenced by historical and cultural heritage,[312] and because its specific inclusion in the PETL might cause too much interference with administrative law.[313] However, the Group now inclines to the view that it would in fact be desirable to move in this direction. Amongst the most important reasons for thinking that the development of common European principles in the area is a worthwhile endeavour today are the following: the increasing importance of public authority liability in national legal systems across Europe and beyond, as evidenced by the many recent legislative reforms, reform projects and supreme court decisions in different jurisdictions (see no 4 above and passim); the recognition in EU law of a still relatively new liability on Member States for violations of EU law and the progressive expansion of its scope, itself adding impetus to national developments (see no 5 above); and the growing influence of decisions of the European Court of Human Rights on national systems (see no 6 above). The Group therefore concluded that, while the reasons it had previously cited for the non-inclusion of public authority liability in the PETL give cause for caution in extending the Principles' scope, they are insufficient to preclude extension in this area altogether. Needless to say, this must be done with sensitivity towards historical and cultural heritages and to interactions with administrative law.

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economic loss is also evident in South Africa: ZA 13, 21, 23. As regards the more ambivalent attitude in Israel, see IS 9, 11 ff (comparing expansive and restrictive approaches).

311 EW 47, 49; US 43. See also ZA 53. The issue has been left open by the courts in Israel: IS 90.

312 Art 6:102 PETL cmt 22.

313 Intro to Ch 6 PETL cmt 7. See also Art V–7:103 DCFR.

84 The search for common European principles of public authority liability faces the not inconsiderable challenge of overcoming the pronounced diversity to be found in the different national and supranational systems. The image that emerges from the preceding paragraphs is of the law of public authority liability with a kaleidoscopic quality: variously conceived as public or private; made up of a bewildering array of different constituent elements, which vary from jurisdiction to jurisdiction, as is encapsulated in the split between those basing liability on fault and those on illegality or violation of a duty; and diverging decisively in their policy orientation. With the exception of the last of these factors, however, the appearance of diversity may be misleading. The distinction between fault-based regimes and those based on illegality or breach of duty should not be exaggerated: fault may itself be seen as a breach of duty and illegality can be what constitutes fault in this context (see no 31 above). Though the legal systems overlay this basic component of liability with a varied set of other principles and concepts, these are to some extent functionally equivalent – especially insofar as they act as control mechanisms limiting the scope or stringency of public authority liability as need requires (see nos 33 and 77 above).

85 That leaves us with the matter of policy orientation, where differences between legal systems are pronounced and cannot simply be regarded as superficial. But there is a large core of commonality of approach *within* continental Europe, even extending to some degree to the mixed legal systems of Israel and South Africa. It is the common law which is out of step, with its insistence on categorical barriers to liability applying to broad areas of public authority activity – effected through the limited duty of care recognised by English law and the discretionary function immunity in the United States. These outliers, whose policy orientation is quite alien to that of most European systems, should not prevent the attempt to put forward a common European approach to public authority liability. Work should therefore continue towards the formulation of such principles so as to encourage the commencement of debate about the possibility of legislative harmonisation in this area at EU level while also facilitating 'soft harmonisation'[314] by providing a model package of legal principles that may be taken into account by law reformers and courts wishing to develop their own laws in accordance with advanced legal thinking in Europe generally. It would, though, be premature as yet for the European Group to propose particular content for those principles. Its work programme towards the revision, updating and expansion of the Principles of European Tort Law continues and the question of whether principles of public authority liability should be published separately or integrated within them remains to be finally decided.

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314 For discussion of the term, and its distinction from 'hard harmonisation', see *G Wagner*, The Project of Harmonizing European Tort Law (2005) 42 Common Market Law Review 1269 at 1270 and 1281 ff.